

April 6, 2015

Nicolas Heidorn
3308 L Street
Sacramento, CA 95814

Re: Your Request for Informal Assistance
Our File No. I-15-016

Dear Mr. Heidorn:

This letter responds to your request for advice regarding the revolving door provisions of the Political Reform Act (the “Act”).¹ This letter should not be construed as assistance on any conduct that may have already taken place. (See Regulation 18329(c)(4)(A).) Additionally, this letter is based on the facts presented. The Fair Political Practices Commission does not act as a finder of fact when it provides advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) We offer no opinion on the application of laws other than the Political Reform Act, such as the post-employment provisions of Public Contract Code Section 10411. Because your questions are general in nature, we are treating your request as one for informal assistance.²

QUESTION

Do the Act’s revolving door provisions prohibit you from assisting a city with applying for funding from the Strategic Growth Council in light of your employment with CalEPA and prior role in developing application guidelines?

CONCLUSION

The one-year ban prohibits you from making any appearance or communication before CalEPA or the Strategic Growth Council in regards to an application for funding for one-year after leaving the state. However, the one-year ban does not prohibit you from assisting a city

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

with an application so long as you are not identified in submitting the application and do not otherwise make an appearance or communication before CalEPA or the Strategic Growth Council. Neither the permanent ban nor Section 87407's ban on influencing a decision affecting a prospective employer apply to the facts you have presented.

FACTS

You are currently the Assistant General Counsel at CalEPA. CalEPA is a member of the Strategic Growth Council, a state interagency council composed of various agency secretaries. The council was awarded \$130 million in the last budget cycle to create a statewide, affordable housing, land use, and transportation competitive grant program. Private and non-profit developers, as well as cities and other public agencies, can apply for funding for qualifying projects and the state chooses which projects to fund. The council recently adopted guidelines for how applications for funding will be scored. As staff, you helped write the guidelines that were ultimately adopted. You emphasize that your prior involvement in drafting guidelines was limited to general guidelines applicable to all potential applicants as the "grants are a competitive, general pool of money that can fund many different types and sizes of housing and transportation projects in nearly all areas of the state."

At this time, the review and recommendation of projects has begun. You state that you are not going to be involved in the review and recommendation of projects. However, you are interested in applying with cities that may be looking for people with expertise in infrastructure and transportation financing. If hired you ask if you may assist a city with an application for funding from the council.

ANALYSIS

Public officials who leave state service are subject to two types of post-governmental employment provisions under the Act, the one-year ban and the permanent ban. In addition, Section 87407 and 87100 prohibits officials from making, participating in making, or using their position to influence decisions affecting persons with whom they are negotiating employment, or have any arrangement concerning employment. These provisions are commonly referred to as the "revolving door" prohibitions.

One-Year Ban

The "one-year ban" prohibits a former state employee from making, for compensation, any formal or informal appearance, or making any oral or written communication, before his or her former agency for the purpose of influencing any administrative or legislative actions or any discretionary act involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. (See Section 87406; Regulation 18746.1.)

The one-year ban applies to any employee of a state administrative agency who holds a position that is designated or should be designated in the agency's conflict-of-interest code. (Section 87406(d)(1); Regulation 18746.1(a)(2).) The ban applies for twelve months from the date the employee permanently leaves state office or employment. While in effect, the one-year ban applies only when a former employee or official is being compensated for his or her appearances or communications before his or her former agency on behalf of any person as an agent, attorney, or representative of that person. (Regulation 18746.1(b)(3) and (4).)

In contrast to the permanent ban, which only applies to certain matters involving specific parties such as "judicial or quasi-judicial" proceedings, the one-year ban applies to "any appearance or communication made for the purpose of influencing administrative or legislative action or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property." (Regulation 18746.1(b)(5).) An appearance or communication is for the "purpose of influencing" if it is made for the "principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding." (Regulation 18746.2.) An appearance or communication includes, but is not limited to, conversing by telephone or in person, corresponding in writing or by electronic transmission, attending a meeting, and delivering or sending any communication. (*Ibid.*)

Finally, appearances and communications are prohibited only if they are (1) before a state agency that the public official worked for or represented, (2) before a state agency "which budget, personnel, and other operations" are subject to the control of a state agency the public official worked for or represented, or (3) before any state agency subject to the direction and control of the Governor, if the official was a designated employee of the Governor's office during the twelve months before leaving state office or employment. (Regulation 18746.1(b)(6).)

As the Assistant General Counsel at CalEPA, your position is designated in CalEPA's conflict of interest code, and your post-employment actions are restricted under the one-year ban for 12 months from the date you permanently leave CalEPA. As addressed above, the one-year ban applies to any administrative or legislative action and any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. Moreover, as you assisted in preparing guidelines on behalf of the Strategic Growth Council, as a representative of CalEPA, the one year-ban applies to appearances and communications before either CalEPA or the Strategic Growth Council. Pursuant to Regulation 18746.1(b)(6)(C)(i), "[a]n employee loaned to an agency is deemed to have worked for or represented that agency." Accordingly, the one-year ban prohibits you from representing a city in any appearance or communication before the Strategic Growth Council regarding an application for funding.

Nonetheless, a former agency official may draft proposals on a client's behalf to be submitted to the official's former agency, without violating the one-year ban, so long as the former official is not identified in connection with the client's efforts to influence the agency. (*Cook* Advice Letter, No. A-95-321; *Harrison* Advice Letter, No. A-92-289.) And, a former

agency official may use his or her expertise to advise clients on the procedural requirements, plans, or policies of the official's former agency so long as the employee is not identified with the employer's efforts to influence the agency. (*Perry* Advice Letter, No. A-94-004.) The one-year ban does not prohibit you from assisting a city with an application so long as you are not identified in submitting the application and you do not otherwise make an appearance or communication before CalEPA or the Strategic Growth Council.

Permanent Ban

The "permanent ban" prohibits a former state employee from "switching sides" and participating, for compensation, in certain proceedings involving the State of California and other specific parties, or assisting in the proceeding if the proceeding is one in which the former state employee participated while employed by the state. (Sections 87401 and 87402; Regulation 18741.1.) The permanent ban applies when an official has permanently left or takes a leave of absence from any particular office or employment. (Regulation 18741.1(a)(1).)

The permanent ban is a lifetime ban and applies to any formal or informal appearance or any oral or written communication – or aiding, advising, counseling, consulting, or assisting in representing any other person, other than the State of California, in an appearance or communication – made with the intent to influence any judicial, quasi-judicial, or other proceeding in which you participated while you served as a state administrative official. "Judicial, quasi-judicial or other proceeding" means any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency . . ." (Section 87400(c).)

Additionally, an official is considered to have "participated" in a proceeding if he or she took part in the proceeding "personally, and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation, or use of confidential information . . ." (Section 87400(d).)

However, "[t]he permanent ban does not apply to a 'new' proceeding even in cases where the new proceeding is related to or grows out of a prior proceeding in which the official had participated. A 'new' proceeding not subject to the permanent ban typically involves different parties, a different subject matter, or different factual issues from those considered in previous proceedings." (*Rist* Advice Letter, No. A-04-187; also see *Donovan* Advice Letter, No. I-03-119.) New contracts with the employee's former agency in which the former employee did not participate are considered new proceedings. (*Leslie* Advice Letter, No. I-89-649.) A new contract is one that is based on new consideration and new terms, even if it involves the same parties. (*Ferber* Advice Letter, No. I-99-104; *Anderson* Advice Letter, No. A-98-159.)

Based upon the facts provided, participating in the drafting of the general guidelines applicable to all applicants is a separate proceeding from any particular application. Provided

you have had no past participation in a proceeding specific to the particular applicant, the permanent ban does not prohibit you from assisting a city with an application.

Section 87407

A public official may negotiate and accept an offer of future employment before leaving his or her current state position. However, Section 87407 is designed to ensure that the official does not use his or her state position to make any decisions that unduly benefit the organization that is hiring the official. Section 87407 states:

“No public official shall make, participate in making, or use his or her official position to influence, any governmental decision directly relating to any person with whom he or she is negotiating, or has any arrangement concerning, prospective employment.”

However, Regulation 18747(d)(3) specifically states that the prohibitions of Section 87407 do not apply if “[t]he prospective employer is a state, local, or federal governmental agency.” Accordingly, Section 87407 does not apply when negotiating prospective employment with a city.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Hyla P. Wagner
General Counsel

By: Brian G. Lau
Senior Counsel, Legal Division

BGL:jgl